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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2005 TERM

STATE OF ARKANSAS — PETITIONER

V. — 05-1587

BRADY CARTER — RESPONDENT

CARTER'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

JEFFREY M. ROSENZWEIG *
300 Spring St. Suite 310
Little Rock, AR 72201
(501) 372-5247
Attorney for Respondent and Member of Supreme Court Bar

WILLIAM O. JAMES JR.
221 West 2d St.
Little Rock, Ar 72201
(501) 375-0900
Attorney for Respondent and Member of Supreme Court Bar

* ***Attorney of Record***

QUESTION PRESENTED

The question as framed by the State ["*Does a trial court's erroneous rejection of a charged offense without resolving against the government any of the factual elements of the offense constitute an acquittal under the Double Jeopardy Clause?*"] erroneously characterizes what happened in this case. The trial court did resolve the factual elements.

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CITATION TO OPINION BELOW

The decision for which the State seeks certiorari is *Carter v. State*, ___ Ark. ___, ___S.W.3d ___, 2006 WL 301077 [*Carter II*]. The original decision in this case was *Carter v. State*, 360 Ark. 266, ___S.W.3d ___ 2005 WL 74083 [*Carter I*].

JURISDICTIONAL STATEMENT

Carter has no objection to the Court's jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.....

Fourteenth Amendment, United States Constitution:

....nor shall any state deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Brady Carter was charged in the Circuit Court of Pulaski County, Arkansas with the offenses of Kidnapping, Aggravated Robbery, Terroristic Threatening in the First Degree and Battery in the Third Degree. A jury trial was waived.

In the nonjury trial, Circuit Judge Timothy D. Fox convicted Carter of Kidnapping, Terroristic Threatening and Battery, merging the misdemeanor battery into the Terroristic Threatening charge. On the Aggravated Robbery, Ark. Code Ann. § 5-12-103, charge – a Class Y felony with a penalty range of 10 to 40 years or life, with a requirement of service of 70 percent before parole eligibility— the judge reduced the charge to its lesser included offense , Robbery, Ark. Code Ann. § 5-12-102, a Class B felony with a penalty range of 5 to 20 years. Carter was sentenced to 10 years on the kidnapping, six years on the terroristic threatening and three and a half years on the robbery, to run concurrently. Carter has been paroled, but if relief is not granted by this Court, must be resentenced to at least 10 years for Aggravated Robbery and for which, under Arkansas law, he is not eligible for parole until serving seventy percent (70%) thereof.

Carter appealed and the State cross-appealed. The latter's appeal is authorized by Rule 3 of the ARKANSAS RULES OF APPELLATE PROCEDURE—CRIMINAL, which allows appeals by the State involving the " correct

and uniform administration of the criminal law."

The Arkansas Supreme Court held in *Carter I* that the trial court, in convicting Carter of the lesser offense of robbery had misapplied relevant Arkansas precedents.

> For the above reasons, we affirm Carter's convictions on the sufficiency of the evidence; however, we reverse and remand the robbery conviction for further proceedings. See *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997) (when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated).

Carter filed a petition for rehearing seeking prohibition of further proceedings due to double jeopardy. The Arkansas court denied the petition without comment other than to cite *Zawodniak*.

Carter sought certiorari in this Court, and this Court granted the writ, vacated and reversed for reconsideration in light of *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005). *Carter v. Arkansas*, 126 S.Ct. 65 (2005). On remand, the Arkansas Supreme Court precluded further proceedings against Carter on double jeopardy grounds. The State seeks certiorari from that decision. Carter opposes that grant.

REASONS NOT TO GRANT THE WRIT

THE ARKANSAS SUPREME COURT'S DECISION IN CARTER II WAS CORRECT. DOUBLE JEOPARDY WOULD BE VIOLATED BY RETRIAL OR RESENTENCING FOR AGGRAVATED ROBBERY. THE TRIAL COURT'S DECISION WAS A RESOLUTION OF THE FACTUAL ALLEGATIONS AGAINST CARTER.

The State of Arkansas' petition for certiorari should be denied. Despite the State's evident straining to find a distinction, the Arkansas Supreme Court's decision upon the remand of *Carter v. State*, --- S.W.3d ----, 2006 WL 301077 (2/9/06). [*Carter II*] is a garden variety application of the Fifth and Fourteenth Amendment double jeopardy principles re-enunciated in *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005), but having their derivation in several other cases of this Court, most prominently *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349 (1977); *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957); *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671 (1962).

A conviction of a lesser offense of Robbery, as occurred in Carter's case, is an acquittal of the greater offense, in this case Aggravated Robbery. This is established as a matter of constitutional law in *Green* and an explicit provision of Arkansas statutory law. Ark. Code Ann. § 5-1-112(1).[1].

---

[1] Ark. Code Ann. § 5-1-112(1) includes this language: "A determination of guilt of a lesser included offense is an acquittal of the greater inclusive offense,

Assuming, as Carter concedes this Court probably will, that the state trial judge's decision involved an error of Arkansas law,[2] the enduring principle from *Smith*, *Martin Linen*, *Green* and *Fong Foo* is that a not guilty verdict cannot be disturbed on appeal, even if mistaken.

Smith was merely an application of that longstanding principle to an in-trial directed verdict situation. Clearly, what is forbidden to the trial court, as in *Smith*, is forbidden to the appellate court—contrary to what Arkansas tried to do before being asked to reconsider in light of *Smith*.

The State's claim that the trial judge's ruling had nothing to do with resolution of the guilt-innocence determination is specious. The trial judge's decision had everything to do with guilt-innocence. This is what the trial judge said in convicting

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although the conviction is subsequently set aside."

[2] Carter argued on remand to the Arkansas Supreme Court that the trial judge's remarks in reducing the charge were supportable under Arkansas law. Carter was alleged to have been an accomplice. The principal had a weapon. Ark. Code Ann. § 5-2-406, which provides

> When two (2) or more persons are criminally liable for an offense of which there are different degrees, each person shall be liable only for the degree of the offense that is consistent with his own mental culpability or with his own accountability for an aggravating fact or circumstance.

An accomplice not knowing or ratifying the presence of the weapon would be guilty only of the lesser offense.

of the lesser offense:

> I have a problem with the aggravated robbery charge. For the record, I believe there was a gun present. The testimony was that it was used by someone else. That would normally create accomplice liability on the part of the defendant.
>
> The victim testified today, Mr. McVay testified today that he was hit once in the back of the head with the weapon and once in the face. Now Mr. Carter had a difference. He said he slugged the guy in the face with his fist and that that's what happened. There's no question that the blows to the face and the head, together with the other abrasions and burn makers, together constitute serious physical injury. I don't have a problem with that.
>
> I kind of felt about the utilization of that gun, with the butt end of the gun, the same way for the aggravated robbery charge as the Supreme Court explained with respect to the aggravated battery charge that we previously had.
>
> So what I'm going to do is, I'm going to convict the defendant of the lesser-included offense of robbery, which is a Class B felony. If I don't have the authority to do that, then I don't believe the aggravated robbery charge was met in this case because of the facts that I heard today.
>
> If I have the authority to do it, then—I mean, that's what I am doing, but, for the record, in case there's an appeal, the State did not ask or did not reduce it and the defendant did not ask for the lesser included offense.
>
> (Trial Record 277-278)

If that is not a finding on a guilt-innocence issue, it is impossible to imagine what might be. This is simply not a situation such as that recognized in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187 (1978). *Scott* merely held that there was no double jeopardy bar to retrial after a dismissal for matters wholly unrelated to guilt

or innocence. In *Scott*, that was pretrial delay. In *Smith* and in the case at bar, the operative decision—even if mistaken— was clearly about guilt and innocence.

There simply is no basis in fact or law for certiorari to be granted. The State's petition should be denied.

CONCLUSION

Wherefore, Carter prays that this Court deny the State's petition for certiorari.

BRADY CARTER

JEFFREY M. ROSENZWEIG
300 Spring St. Suite 310
Little Rock, AR 72201
(501) 372-5247
Attorney for Respondent and
Member of Supreme Court Bar
Counsel of Record

WILLIAM O. JAMES JR.
221 West 2d St.
Little Rock, Ar 72201
(501) 375-0900
Attorney for Respondent and
Member of Supreme Court Bar

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing to David Raupp, Assistant Attorney General of Arkansas, 323 Center St., Little Rock, AR 72201 by first class mail this 11 day of July, 2006.

JEFFREY M. ROSENZWEIG

Supreme Court of the United States

No. 05-1587

Arkansas,

Petitioner

v.

Brady Carter

ON PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of Arkansas, No. CR04-164.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Arkansas.

IT IS ORDERED by this Court that the said petition is denied.

October 2, 2006

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

Supreme Court of the United States

No. 05-1587

Arkansas,

Petitioner

v.

Brady Carter

ON CONSIDERATION of the motion of respondent Brady Carter for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion is granted.

October 2, 2006

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy